

BEFORE THE
Federal Communications Commission

WASHINGTON, D. C. 20554

JUL 19 1996

In the Matter of)

Annual Assessment of the Status of)
Competition in the Market for the)
Delivery of Video Programming)

CS Docket No. 96-133

To: The Commission

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COMMENTS
OF
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

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SUMMARY

The National Rural Telecommunications Cooperative ("NRTC") is a Multichannel Video Programming Distributor ("MVPD"). Based upon NRTC's experience in the MVPD marketplace, NRTC believes that the vertically-integrated cable industry suppresses competition in the market for delivery of video programming by competing MVPDs. In light of the cable industry's barriers to competition from the DBS industry, NRTC strongly urges the Commission to strengthen its pro-competitive rules and policies. Specifically, NRTC urges the Commission to guard against anti-competitive conduct by prohibiting exclusive arrangements between vertically-integrated cable programmers and non-cable operator distributors in areas unserved by cable. The Commission also should adopt a cross-ownership restriction on cable companies and DBS operators.

NRTC believes that the dominant position of cable operators in the multichannel video programming market is exacerbated by the Commission's Program Access rules which -- although recognizing the Commission's statutory authority to award damages -- fail to include specific provisions awarding damages or even providing for the return of overpayments for a Program Access violation.

In Section 207 of the Telecommunications Act of 1996, Congress mandated that the FCC remove restrictions that impair a viewer's ability to receive DBS programming. NRTC strongly supports the Commission's decision to preempt state

and local zoning regulations against DBS satellite antennas and urges the FCC to adopt a per se preemption standard against these types of state and local zoning restrictions. NRTC also supports the Commission's proposal to preempt nongovernmental restrictions on DBS satellite antennas. This preemption policy should also be based upon a per se standard.

Finally, the current copyright laws stifle competition by prohibiting the satellite retransmission of network signals for private home viewing within the Grade B contour of a network affiliate station or to households subscribing to a cable system carrying the network signal. NRTC urges the Commission to request that Congress remove this artificial restriction so that network signals can be provided to all households via DBS and other satellite technologies.

NRTC urges the Commission to focus its pro-competitive efforts upon the dominant players in the national market for multichannel video programming: cable operators. Full competition in the market for delivery of video programming will not exist until the Commission curbs the potential for anticompetitive conduct by the cable industry.

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Pursuant to Section 1.430 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"), the National Rural Telecommunications Cooperative ("NRTC") by its attorneys, hereby submits these Comments concerning the above-captioned Inquiry.^{1/} NRTC urges the Commission to strengthen its pro-competitive rules and policies. Full competition in the market for delivery of video programming will not exist until the Commission prohibits exclusive arrangements between vertically-integrated programmers and non-cable operator distributors in areas unserved by cable. The Commission should also prohibit cross-ownership between cable entities and DBS operators. Furthermore,

^{1/} Notice of Inquiry ("Notice"), 61 Fed. Reg. 34409 (released July 2, 1996).

competition will remain fragmentary, at best, until the Commission's rules allow for the recovery of damages by those aggrieved by violations of the Program Access rules. NRTC supports the Commission's efforts to preempt governmental and nongovernmental restrictions against DBS satellite antennas. Finally, NRTC urges the Commission to request Congress to revise the copyright laws by removing the artificial barrier that prevents the receipt of network signals by millions of households using DBS technology.

I. BACKGROUND

1. NRTC is a non-profit cooperative association comprised of 521 rural electric cooperatives and 231 rural telephone systems located throughout 48 states. NRTC's mission is to assist member companies and affiliates in meeting the telecommunications needs of more than 60 million American consumers living in rural areas. Through the use of satellite distribution technology, NRTC is committed to extending the benefits of information, education and entertainment programming to rural America -- on an affordable basis and in an easy and convenient manner -- just like those services are available on cable in more populated areas of the country. NRTC seeks to ensure that rural Americans receive the same benefits of the information age as their urban counterparts

2. Under an agreement with DirecTV, Inc., NRTC, its members and affiliated companies currently market and distribute up to 150 channels of popular cable and broadcasting programming ("DirecTV®") to more than 400,000 rural households equipped with 18 inch DBS satellite receiving antennas. Using C-Band technology, NRTC and its members also currently market and distribute packages of satellite-delivered programming, called "Rural TV®," to some 70,000 Home Satellite Dish ("HSD") subscribers throughout the country. Accordingly, NRTC is engaged in the business of making available for purchase, by subscribers and customers, multiple channels of video programming. As a result NRTC is a Multichannel Video Programming Distributor ("MVPD") under the Commission's rules. 47 C.F.R. § 76.1000(e).

II. COMMENTS

A. The Commission Should Prohibit Exclusive Arrangements Between Vertically-Integrated Cable Programmers and Non-Cable Distributors in Areas Unserved by Cable.

3. The Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act") directed the Commission to establish rules to prohibit exclusive arrangements which prevent MVPDs from obtaining programming from vertically-integrated programmers for distribution to persons in areas not served by cable. 47 U.S.C. 548(c)(2)(C). The Commission's implementing rule, however, failed to

prohibit exclusive arrangements between vertically-integrated cable programmers and non-cable operator distributors.^{2/}

4. In Comments and Reply Comments filed in last year's Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, NRTC pointed out that the vertically-integrated cable programming industry stifles competition from MVPDs by using exclusive contracts with non-cable entities to restrict access to programming.^{3/} NRTC explained that because the Commission's rules fail to implement fully the Congressional ban against exclusive arrangements by vertically-integrated programmers in areas unserved by cable, NRTC is unable to obtain access to critical programming for distribution via DBS. Unfortunately, the situation has not improved since last year's Report to Congress.

5. Key programming is still unavailable to NRTC and other MVPDs as a result of exclusive arrangements between vertically-integrated cable programmers and non-cable operator distributors, despite express language to the contrary in the 1992 Cable Act. Without open access to programming, full competition to cable cannot be expected to develop and flourish.

^{2/} 47 C.F.R. 76.1002(c)(1).

^{3/} NRTC Comments at 2, NRTC Reply Comments at 4.

**B. The Commission Should Prohibit Cross-Ownership
Between Cable Affiliates and DBS Operators.**

6. In November 1995, the Commission proposed pro-competitive revisions to its DBS service rules.^{4/} The Commission stated that DBS licensees or operators that are affiliated with cable operators would not have the same incentive as DBS service providers without such affiliations to offer DBS services that compete with other MVPDs for subscribers. Notice of Proposed Rule Making ("Notice"), IB Docket No. 95-168, PP Docket No. 93-253, at ¶ 40. Rather, cable-affiliated entities would have an incentive to minimize competition from any DBS resources they control, and would coordinate their joint activities to maximize their combined profits. Notice at ¶¶ 37, 40.

7. In its Notice in IB Docket No. 95-168, PP Docket No. 93-253, the Commission voiced its concern that:

Cross-ownership between DBS operators and other MVPDs may present opportunities for anticompetitive strategic conduct that potentially has adverse effects at the firm or national level.

Notice at ¶ 34. In order to rectify this situation, the Commission proposed to extend the conditions imposed on Tempo Satellite, an existing DBS permittee that is wholly owned by a cable operator, to all MVPD providers that own DBS resources so that

^{4/} Notice of Proposed Rule Making ("Notice"), 60 Fed. Reg. 55822 (November 3, 1995)

DBS services will not be offered primarily as ancillary services, or be provided to subscribers of non-DBS systems under different terms than are being offered to non-subscribers. Notice at ¶¶ 55-56.

8. NRTC supported the Commission's attempt to guard against potential anticompetitive conduct by cable companies acting in concert with DBS providers. Surprisingly, however, the Commission in its Report and Order declined to adopt its own proposals governing conduct of entities in the MVPD marketplace. Report and Order in IB Docket No. 95-168, PP Docket No. 93-253 (December 15, 1995) at ¶¶ 104, 106. Instead, the Commission reasoned that since it was only offering one full-CONUS DBS license, its "structural" rule restricting ownership of orbital locations would spur adequate competition within the DBS marketplace and among MVPDs overall. Report and Order at ¶¶ 104, 105.

9. Since this decision, cable programmers have threatened to further increase their control over the MVPD marketplace via appropriation of Canadian orbital slots and industry consolidation. Having failed to acquire a U.S. DBS slot at auction, Primestar Partners L.P., of which Tele-Communications, Inc. ("TCI") owns approximately 20%, devised a plan to migrate to high power using the 82° orbital slot controlled by Canada. NRTC and other U.S. DBS interests voiced their concerns that Canadian orbital positions not be used to provide DBS services to U.S. subscribers, at least until Canada allows U.S. DBS licensees to serve Canadian subscribers. On

July 16, 1996, the International Bureau denied the subject applications, citing a lack of a Canadian satellite license.^{5/}

10. NRTC believes that cross-ownership between a vertically integrated cable programmer such as TCI and a DBS operator, which Primestar would become, would adversely affect competition in the program distribution market nationwide. In fact, the Justice Department, in a letter to the FCC made public on July 3, 1996, expressed its view that since TCI is the largest cable operator, "there is some concern that TCI . . . may have an incentive to engage in anticompetitive behavior" in the United States through use of the Canadian orbital slot for provision of DBS service to the United States.^{6/} Consumer groups have voiced similar concerns.

11. More needs to be done by the Commission to protect the nascent DBS industry, which currently serves only about 2% of U.S. homes, from undue dominance by the cable industry.^{7/} The Commission should reincarnate its conduct restrictions from IB Docket No. 95-168, PP Docket No. 93-253. Without restrictions

^{5/} See, Applications of TelQuest Ventures, L.L.C. and Western Tele-Communications, Inc., File Nos. 758-DSE-P/L-96; 759-DSE-L-96 and 844-FDR-P1-L-96.

^{6/} See also, Communications Daily, July 3, 1996, at 4. NRTC urges the Commission to recognize that any restrictions on cross-ownership should be targeted against and limited to cross-ownership relationships between DBS operators and cable entities.

^{7/} Via Satellite, Open Architecture DBS and the Era of Customized Television, June 1996, at 44.

against cross-ownership between cable companies and DBS operators, the potential of DBS as a competitor to cable will not be fully realized.

C. The Commission Should Allow for an Award of Damages for a Program Access Violation.

12. In its Notice in IB Docket No. 95-168, PP Docket No. 93-253, the Commission also requested comment on whether the existing Program Access rules adequately address vertical foreclosure concerns arising from the vertical integration of DBS operators, other MVPDs, and program vendors, especially in connection with "headend in the sky" distribution from DBS satellites. Notice at ¶¶ 57-62. Despite the arguments of several participants in that proceeding, including NRTC, that the Program Access rules are inadequate, the Commission in its Report and Order nonetheless determined that the issue was beyond the scope of that proceeding. Report and Order at ¶ 109, n. 212. However, the Commission invited aggrieved parties to address the issue in a complaint or in a future proceeding. Report and Order at ¶ 109, n. 212.

13. The Commission's Notice of Inquiry again requests information on the effectiveness of the Program Access rules. Notice of Inquiry at ¶ 21. Still, the Commission's Program Access rules do not specifically allow for an award of damages for a Program Access violation. NRTC believes the time is right to resolve this long standing deficiency. No public policy is served by allowing violators of the

Program Access rules to escape liability. The FCC must bolster the rules if it hopes to ensure a level playing field in the MVPD marketplace. Without the possibility of an award of damages to an aggrieved MVPD following successful prosecution of a complaint at the Commission, there is little practical incentive for an MVPD even to pursue a remedy at the Commission. Nor is there any real incentive for violators to comply with the rules. Indeed, the failure of the Commission to award damages may create an economic disincentive for compliance, when ill-gotten gains may be retained by the violator with impunity. At a bare minimum, the Commission should ensure that aggrieved parties recover demonstrated overpayments following successful prosecution of an unlawful price discrimination complaint.

D. The Commission Should Preempt State, Local and Nongovernmental Restrictions Against DBS Satellite Antennas.

14. Congress specifically recognized the importance of DBS to a competitive marketplace when it instructed the FCC to "prohibit restrictions that impair a viewer's ability to receive video programming services through . . . direct broadcast satellite services." 47 U.S.C. § 207. The Commission's Report and Order ("Order") and Further Notice of Proposed Rule Making ("Further Notice") in IB

Docket No. 95-59 is a partial fulfillment of the Congressional directive because it largely preempts state and local zoning restrictions against DBS satellite antennas.^{8/}

15. In its Further Notice, the Commission proposed to preempt nongovernmental restrictions, such as homeowners' association restrictions and deed covenants, against DBS satellite antennas. NRTC filed Comments and Reply Comments in that proceeding, urging the Commission to replace its rebuttable presumption policy with a strict, per se preemption standard for both governmental and nongovernmental restrictions on DBS satellite antennas.

16. The Commission's proposals to strictly preempt nongovernmental restrictions would spur competition in the MVPD marketplace. There are currently tens of thousands of homeowners' associations across the country, with their own particular restrictions against use of satellite antennas. The result of this scheme of regulation is that DBS providers find it impossible to identify the thousands of nongovernmental restrictions, understand their requirements, and attempt to comply with them in a consistent manner.^{9/}

^{8/} Report and Order and Further Notice of Proposed Rule Making, released March 11, 1996.

^{9/} The House Committee Report accompanying Section 207 of the Telecommunications Act of 1996 ("1996 Act") recognized this problem when it stated that:

17. Only a per se preemption of all restrictions against DBS antennas will fulfill Congressional intent to eliminate restrictions that impair viewers' ability to receive DBS. After all, DBS antennas are essentially no different than a mailbox, weathervane, traditional rooftop antenna, barbecue grill, or other common household devices which are routinely attached to dwellings and have become over time a part of the landscape of American communities.

18. Finally, it is important to note that Section 205 of the 1996 Act explicitly grants the FCC exclusive jurisdiction over direct-to-home satellite services. NRTC urges the FCC to affirmatively exercise its exclusive jurisdiction over satellite services to promote competition in the video program distribution market. Exclusive jurisdiction would prevent inconsistent state court rulings and would ensure application of a uniform, national competition policy for DBS.^{10/}

^{9/}(...continued)

The Committee intends this section to preempt enforcement of . . . restrictive covenants or encumbrances that prevent the use of antennae designed for . . . receipt of DBS services. Existing regulations, including . . . restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.

H.R. Rep. No. 204 at 123-124.

^{10/} Another state-level activity that may affect the DBS industry is a trend to tax satellite-delivered programming. Recent trade press reports note that several states, including Maryland, Missouri, North Dakota, New York, and Washington have proposed or adopted such laws. Other states are in various stages of considering

(continued...)

E. Current Copyright Law Prevents a Competitive MVPD Marketplace.

19. The Commission requests information concerning factors that affect a household's decision to subscribe to cable or another type of MVPD. Notice of Inquiry at ¶ 15. NRTC strongly believes that the current Copyright law is an important -- and inappropriate -- factor in this decision, because it creates an artificial barrier that often compels consumers to choose cable rather than DBS.

20. Under the Copyright Act, only "unserved households" may lawfully receive retransmitted signals of network stations for private home viewing. 17 U.S.C. § 119(a)(2). "Unserved households" is defined to include, among other things, only those households that have not, within 90 days of subscribing to receive the satellite signals, subscribed to a cable system that provides the signal of a primary network station affiliated with that network, and cannot receive a Grade B signal of the primary network station affiliated with that network. 17 U.S.C. § 119(d)(10).

21. Although these statutory limitations on the right to retransmit network signals may have been necessary at one point to protect the cable industry or network-affiliate relationships, that time has passed. Under the Telecommunications Act of

¹⁰/(...continued)

proposals to tax DBS and other communications providers. NRTC believes the Commission should monitor these state actions to determine their impact on the nationwide delivery of DBS services.

1996, markets for the delivery of video programming services should be expanded through competition, not limited by artificial government restrictions. One delivery technology should not be favored over another. It is inappropriate at this stage of the development of video markets to protect network-affiliate relationships or the cable industry at the expense of competition in the provision of video programming. Consumers should have the benefits of free choice, full program access and a multitude of delivery technologies.

22. The Copyright Act contains artificial impediments that block the distribution of network signals via satellite to subscribers who may wish to purchase them. Because consumers cannot freely purchase network satellite signals they may wish to receive via DBS, they are forced in some areas to subscribe to cable or to receive inadequate over-the-air service ^{11/}. This policy results in a significant loss of DBS subscribership. It unnecessarily restricts consumer access to video programming.

23. Despite the fact that the technology exists to provide network signals to all households, the Copyright Act erects an unnecessary barrier to competition by DBS operators in the MVPD marketplace. This unnatural policy also contributes to

^{11/} In some cases, cable service is also demonstrably unreliable. Consumers should not be required to accept low quality video and audio service over cable or through terrestrial television systems, when high quality DBS services are available.

the inelastic demand for cable services, as evidenced by the fact that despite large cable rate increases during the past year, cable subscribership has actually increased nationwide. Since January 1, 1996, large cable operators have raised their rates significantly. On average, TCI's rates have increased 13%, and Time Warner Cable has increased its rates 10%.^{12/} Between them, Time Warner and TCI serve about 40% of the nation's cable subscribers.

24. On June 1, 1996, another major cable rate hike occurred across the country.^{13/} Estimates of the average nationwide increase range between 5%, which is an average increase of \$1.50 per customer per month, to 20%, which is an average increase of \$5.20 per customer per month.^{14/} Even if the lowest figure is correct, an increase of \$1.50 per month per customer dramatically proves the absence of real competition in the MVPD marketplace at the most fundamental level: price.

25. To ameliorate this situation, NRTC submits that the Commission should petition Congress to revise the copyright law so that DBS entities can offer network signals to all households DBS is capable of serving. Otherwise, widescale DBS

^{12/} Multichannel News, "Feds Eye Rising Rates," June 17, 1996 at 1.

^{13/} The 1992 Cable Act allowed cable companies to increase their rates on June 1, 1996.

^{14/} Satellite Business News, "Satellite TV Hopes Cable Pays for Rate Hikes", by Jeffrey Williams, June 19, 1996, at 8. For example, District Cablevision of Washington, D.C. increased its expanded basic rate on June 1, 1996 by \$2.97 per customer per month.

subscribership will continue to be limited to areas where cable is unavailable and to those persons that choose to utilize DBS as a supplement to cable or over-the-air television, rather than a replacement. Unless and until DBS is permitted to offer that which cable is permitted to offer -- a clear picture of a viewer's preferred network programming -- the competitive potential of DBS will be artificially constrained.

III. CONCLUSION

26. NRTC supports the Commission's efforts to clear the way for competition in the provision of multiple channels of video programming by preempting state, local and nongovernment restrictions on DBS satellite antennas. In addition, NRTC applauds the FCC's attempts over the past year to strengthen its pro-competitive policies. However, NRTC submits that the Commission also should prohibit exclusive arrangements between vertically-integrated cable programmers and non-cable distributors in areas unserved by cable. The Commission should protect the DBS industry from cross-ownership with cable industry giants. Furthermore, the Commission's rules must provide for the recovery of damages -- at least in the amount of demonstrated overpayments -- by those distributors clearly and demonstrably injured due to violations of the Commission's Program Access rules. NRTC also requests that the Commission urge Congress to enhance competition in the MVPD marketplace by revising the Copyright Act so that DBS providers may offer


network signals to every household in America and thereby truly compete with cable fully in the MVPD marketplace.

WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Commission to consider these Comments and to revise its rules in accordance with the views expressed herein.

Respectfully submitted,

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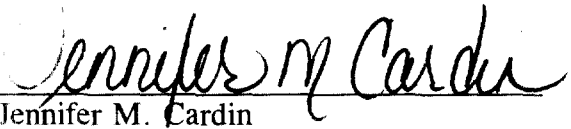
Dated: July 19, 1996

CERTIFICATE OF SERVICE

I, Jennifer M. Cardin, a legal secretary with the law firm of Keller and Heckman LLP hereby certify copies of the foregoing Comments of the National Rural Telecommunications Cooperative, were mailed by first-class mail, postage prepaid, this 19th day of July 1996, to the following:

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